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In the Supreme Court of the United States

OCTOBER TERM, 1976

STENCEL AERO ENGINEERING CORPORATION,
PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals (A. 36a-55a) is reported at 536 F.2d 765. The memorandum of the district court (A. 32a-34a) is reported at 395 F. Supp. 52.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1976. The petition for a writ of certiorari was filed on September 1, 1976, and was granted on November 15, 1976. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the United States is liable under the Federal Tort Claims Act to indemnify a third party for damages paid to servicemen injured in activity incident to military service.

STATUTES INVOLVED

28 U.S.C. 1346(b) provides:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2674 provides:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.
>
> If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

STATEMENT

This case arose out of injuries sustained by an Air Force Reserve pilot in the performance of duties incident to military service. The pilot, who received statutory compensation from the United States pursuant to 32 U.S.C. 318 (A. 23a-25a), sought additional compensation from petitioner Stencel Aero Engineering Corporation for alleged negligence in connection with his injuries. In turn, petitioner seeks indemnity from the United States for any amount for which it may be held liable.

On October 11, 1974, Captain John Donham filed a complaint in the United States District Court for the Eastern District of Missouri against petitioner, the United States, and others for injuries resulting from the alleged malfunctioning of an egress life-support system manufactured by petitioner for use in military aircraft (A. 8a-12a). According to the complaint, which charged the defendants with "negligence and carelessness" (A. 10a), Captain Donham sustained permanent injuries while assigned for training to the 131st Tactical Fighter Group, Mis-

souri Air National Guard, when he was forced to use his egress life-support system to eject from an F-100D fighter aircraft (A. 9a).

Subsequently, petitioner filed a cross-claim for indemnity against the United States, alleging that the egress system had been manufactured according to government specifications and at all times after manufacture had been in the custody or control of the United States (A. 19a, 20a). Petitioner claimed indemnity "for the reason that defendant United States was actively negligent * * * and the negligence of defendant Stencel Aero Engineering Corporation, if any, was passive only" (A. 20a).

The United States moved for summary judgment against Captain Donham (A. 22a) and also moved to dismiss petitioner's cross-claim (A. 30a), on the ground that recovery against the United States on either claim was barred by *Feres* v. *United States*, 340 U.S. 135. The district court granted both motions (A. 31a-34a).

The court of appeals affirmed the dismissal of the cross-claim (A. 36a-55a), holding that the Federal Tort Claims Act did not waive sovereign immunity to third-party indemnity claims arising out of injuries to military servicemen.[1] The court held that the considerations that caused this Court, in *Feres* v. *United States*, *supra*, to bar claims against the United States by servicemen, for injuries incurred incident to their military service, applied as well to

[1] Captain Donham did not appeal from the district court's grant of summary judgment in favor of the United States.

third-party claims against the United States for indemnity for damages arising from such injuries. The court stated (A. 53a): "[w]e cannot agree with [petitioner] that the general language of the [Federal Tort Claims Act] was intended to subject the conduct of the United States in equipping, training, and utilizing the Armed Forces to the varying standards of conduct and concomitant obligations and liabilities imposed by the states upon private citizens." The court observed that it would be "anomalous" to insulate the United States from direct claims by injured servicemen "but authorize a third party in the position of [petitioner] to force the United States to indirectly pay those damages" (A. 44a).

SUMMARY OF ARGUMENT

A. In *Feres* v. *United States*, 340 U.S. 135, this Court held that Congress, in enacting the Federal Tort Claims Act, did not intend to subject the United States to suits brought by servicemen for injuries incurred incident to military service. In this case, petitioner seeks to subject the United States to suit for indemnification with respect to such injuries, resulting from use of equipment manufactured by petitioner. The legal theories to be pursued, and the facts necessary to be proved in this suit, are essentially identical to those that would be involved in a suit brought directly against the United States by the injured serviceman himself. Petitioner claims that the active negligence of the United States caused the serviceman's injury, and any forthcoming litigation

will focus on the alleged actions or inactions of military officers who designed, tested, approved, contracted for, and maintained the egress system. The issue here, therefore, is whether Congress intended to permit a commercial manufacturer to bring litigation of this kind when it has barred suit by the injured serviceman.

In the absence of decisive statutory language or legislative history, the Court has found it useful to look to the consequences of claimed tort remedies in a military context in order to gain "insight for determination of congressional purpose." *Brooks* v. *United States*, 337 U.S. 49, 52. This Court's decision in *Feres* v. *United States, supra,* that Congress did not provide a cause of action dependent upon state law for direct claims by servicemen, relied upon three practical considerations: the inconsistency of that remedy with the comprehensive statutory compensation scheme for military personnel, the disruptive effect of tort litigation on the discipline required for effective military action, and the distinctively federal character of the military. These considerations are equally compelling here.

The third-party remedy petitioner seeks does not comport with the military compensation scheme, an important function of which is to limit liability incurred by the United States in connection with its military activities. Indemnity actions would breach this protective mantle to the same extent as the barred direct claims.

Because the facts to be litigated in petitioner's suit are nearly identical to those that would be litigated in an action brought directly by the serviceman, the litigation process in each case would have the same adverse effects on the internal relationships within the military. Adjudicating indemnity claims would require the courts to pass on the propriety of military decisions and would place military personnel in the position of testifying about the propriety of each other's action, with possible consequent disruption of discipline and the orderly conduct of military affairs.

To make state tort law a factor in the placement and movement of military forces would be inconsistent with the distinctively federal character of the military and with the principle that "the scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority." *Feres* v. *United States, supra,* 340 U.S. at 143-144; *United States* v. *Standard Oil Co.*, 332 U.S. 301, 305-306.

B. Even if the Tort Claims Act waives sovereign immunity to suits for indemnity in this context, petitioner's claim fails to meet the prerequisites for tort indemnity under federal law. Where federal law imposes a bar to direct claims by an injured party, the implications of that bar for third-party actions are also properly decided by reference to federal law. See, *e.g., Newport Air Park, Inc.* v. *United States*, 419 F.2d 342, 347 (C.A. 1); *Galimi* v. *Jetco, Inc.*, 514

F.2d 949 (C.A. 2). Under federal law, indemnity requires liability running from both the purported indemnitor and the indemnitee to the injured party; indemnity is not available from the United States where its direct liability to the injured party is barred by sovereign immunity. See, *e.g.*, *United Air Lines, Inc.* v. *Wiener*, 335 F.2d 379 (C.A. 9), certiorari dismissed *sub nom. United Air Lines, Inc.* v. *United States*, 379 U.S. 951.

Where, as here, the relationship between the purported indemnitor and indemnitee arises in a commercial setting, there is no unfairness in limiting liability to that spelled out in the contract. The price that petitioner obtained for its egress system could have reflected all the risks associated with the contract, including the risk of liability to the users of petitioner's equipment in the event of accident. Preclusion of indemnity here merely ensures that subsequent court action will not undermine the allocation of risks explicit or implicit in the contractual undertaking.

ARGUMENT

THE UNITED STATES IS NOT LIABLE UNDER THE FEDERAL TORT CLAIMS ACT FOR THIRD-PARTY CLAIMS FOR INDEMNITY FOR DAMAGES PAID TO SERVICEMEN INJURED IN ACTIVITY INCIDENT TO MILITARY SERVICE

A. The Tort Claims Act Does Not Waive Sovereign Immunity To Such Claims For Indemnity

More than twenty-five years ago, this Court decided that Congress, in enacting the Federal Tort Claims Act, did not make the United States liable for the damage claims of servicemen injured in activities incident to their military service. *Feres* v. *United States*, 340 U.S. 135. This case presents the question whether the government nevertheless may indirectly be held liable for such injuries in actions brought by third parties for indemnification.

Petitioner argues (Br. 9-15) that to evaluate its claim for indemnification the Court should look to the broad language of the Tort Claims Act, to its specified exceptions, and to "whether * * * there is evidence that Congress did not intend to bring the particular claim within the purview of the [Act]" (Br. 11). The United States does not contest that these are proper inquiries; indeed, we find the third one decisive in this case. We differ with petitioner only in our conclusion, based upon the same factors that this Court found compelling in *Feres*, that Congress did not intend to permit third-party

indemnity claims arising out of injuries to servicemen incident to their military duties.[2]

1. ***Petitioner's theory of the government's liability is essentially the same as would be advanced by the injured serviceman if his action were not barred***

Because an indemnity suit would be substantially identical in nature and practical effect to the litigation of an action for damages brought directly by the injured serviceman, the court of appeals correctly held that the "considerations underlying *Feres* require a limitation of the right under the [Federal Tort Claims Act] to seek indemnity" (A. 45a). Petitioner does not disagree with the conclusion that under *Feres* Captain Donham is barred from bringing an action directly against the United States.[3]

[2] We are concerned here solely with congressional intent with respect to indemnity actions arising out of injuries to servicemen incurred in activity incident to military service. We do not dispute that Congress intended to allow claims for indemnity or contribution in the ordinary civilian context. See *United States* v. *Yellow Cab Co.*, 340 U.S. 543.

[3] At the time of the accident, Captain Donham was engaged in military training as a member of the Missouri Air National Guard. The air national guard is a component of the Air Force of the United States (10 U.S.C. 8062, 8077). Although they function as state militia, air national guard units are at all times subject to federal control and the President prescribes regulations and issues orders necessary to organize, discipline, and govern them (32 U.S.C. 110). The organization, location, and composition of air national guard units are determined by the Secretary of the Air Force (32 U.S.C. 104); the inactive duty training of all units of the air national guard also is subject to regulations prescribed by the Secretary of the Air Force (32 U.S.C. 502). Training for the air defense of the United States, such as Captain Donham

Petitioner instead argues (Br. 16) that the analogy between a direct action and an indemnity action is misdrawn and that petitioner's claim concerns only "the negligence of the United States in its dealings with [petitioner]." An analysis of petitioner's cross-claim (A. 19a-21a) demonstrates, however, that the suggested distinction between petitioner's indemnity action and Captain Donham's direct action is without practical significance.

The United States has no contractual obligation to indemnify petitioner; petitioner's indemnity claim is based on an alleged "tortious relationship between [petitioner] and the United States * * *" (Br. 33). Petitioner asserts a right to indemnity because the "character of the negligence of the United States was

was performing at the time of the accident, is within the express responsibility of the Aerospace Defense Command (Air Force Regulations No. 23-9, 12 February 1968).

In recognition of the federal service performed by air national guardsmen, including guardsmen in inactive duty status, the United States not only pays the salaries of personnel performing training duties but also provides hospitalization, medical care and compensation for disablements suffered during training (32 U.S.C. 318, 319, 320). Additionally, the survivors of guardsmen who die while performing authorized training duties are eligible for death gratuities (32 U.S.C. 321). As a result of these factors, the courts have been uniform in holding that the *Feres* doctrine is applicable to national guardsmen, including those performing inactive duty for training. See *Layne* v. *United States*, 295 F.2d 433 (C.A. 7), certiorari denied, 368 U.S. 990; *Herreman* v. *United States*, 476 F.2d 234, 235 (C.A. 7); *Peluso* v. *United States*, 474 F.2d 605 (C.A. 3); *Coletta* v. *United States*, 300 F.Supp. 19 (D. R.I.). Cf. *United States* v. *Carroll*, 369 F.2d 618 (C.A. 8).

such as to create [petitioner's] liability to someone else" (Br. 17).

More specifically, Captain Donham alleges that petitioner is liable on account of a negligent "defect in the ejection system manufactured by [petitioner]" (Pet. Br. 3). In turn, petitioner alleges "that if there was a defect in the ejection system it was due to the specifications, requirements and components provided by the United States" (*ibid.*). Thus petitioner pleads the elements of a classic indemnity claim by a joint tortfeasor that while the United States was "actively negligent," petitioner's negligence, if any, was "passive only" (A. 20a). At bottom, therefore, the indemnity claim is founded on the legal theory that the negligence of the United States was the proximate cause of the injury to Captain Donham. Absent proof that negligent acts or omissions attributable to the United States caused Captain Donham's injury, petitioner has no basis for any claim against the United States.[4]

Because petitioner must establish that the United States was a "joint tortfeasor" (Br. 23) with respect to Captain Donham's injury, the litigation that petitioner proposes would be indistinguishable, as a practical matter, from the litigation of Donham's own claim against the United States. The litigation as to liability would focus on the alleged actions or inactions of the military officers who had responsibility for the design, testing, purchase, and maintenance of the egress system and its component parts. The military personnel involved would be the subjects of written discovery and would be required to give depositions and courtroom testimony concerning the propriety of actions taken by themselves and other military personnel pursuant to their official duties.

[4] The United States had no duty of care to petitioner. If there is any duty from the United States to petitioner independent of the government's alleged tortious injury to Donham, it must be implied "in fact" from their contractual relationship and adjudicated in the Court of Claims. See *Travellers Insurance Co.* v. *United States*, 493 F.2d 881 (C.A. 3); *Murray* v. *United States*, 405 F.2d 1361 (C.A.D.C.); 28 U.S.C. 1346(a)(2).

The military duties involved here relate to the design and maintenance of military aircraft; other cases could concern, for example, the use of an automatic machine gun or armored vehicle in combat training. In each case, an indemnity claim by the manufacturer would constitute a procedural device for the litigation of the same factual issues that would be litigated by the injured serviceman if he could sue the United States directly. Similarly, the damages recovery (other than possibly litigation costs) under an indemnity theory would correspond to the amount payable had the serviceman been permitted to sue directly. Damages would be measured by the injury to the serviceman, since there is no injury to the manufacturer independent of the serviceman's underlying action.

Petitioner misses the point in arguing (Br. 27-28) that Donham's action against it may be different in substance from its action against the United States. The relevant comparison is between petitioner's suit

against the United States and the suit that Donham is barred from bringing against the United States. Those suits are essentially identical as to the underlying legal theory, the proof that would be required to establish liability, and the amount of damages at issue. Thus the question here is whether Congress, which precluded such suits when brought directly by the injured serviceman, intended to permit commercial manufacturers to bring functionally identical suits under an indemnity theory.

2. *The reasons for barring the serviceman's action apply equally to petitioner's suit for indemnity*

a. *Permitting the serviceman's action would be inconsistent with the statutory compensation scheme for military personnel, would disrupt military discipline, and would be inappropriate in view of the distinctively federal character of the military*

In *Feres*, the executrix of a serviceman killed in a barracks fire attempted to recover damages from the United States on the theory that the military had negligently quartered the serviceman in an unsafe facility.[5] The executrix based her claim upon the broad sweep of the language of the Tort Claims Act and the absence of any express exclusion of servicemen's claims (cf. Pet. Br. 9-23). This Court made clear, however, that the Tort Claims Act cannot be

[5] Decided together with *Feres* was *Jefferson* v. *United States* and *United States* v. *Griggs, Executrix*, both of which involved claims of negligent medical treatment (340 U.S. at 137).

assumed to have waived sovereign immunity for claims arising in a military context. Whether that Act "extends its remedy" must be determined by an examination of "all the circumstances" including "the status of both the wronged and the wrongdoer" (340 U.S. at 142).[6] The Court concluded that the question of congressional intent with respect to actions arising in a military context was to be resolved by reference to three considerations: the consistency of the remedy with other existing statutory schemes, the requirements of military discipline, and the federal character of the military.

The Court proceeded from the premise that the Tort Claims Act cannot be viewed in isolation but "should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole" (340 U.S. at 139). Military personnel are covered by a comprehensive scheme of statutory compensation,[7] and the Court could not escape "attributing some bearing" to the congressional scheme "of simple, certain, and

[6] The legislative history of the Tort Claims Act is inconclusive on the question of remedies in a military context. See *Brooks* v. *United States*, 337 U.S. 49; *Feres* v. *United States*, *supra*, 340 U.S. at 139-140. The legislative history relied upon by petitioner (Br. 20-22) relates to the availability of an indemnity action generally (see *United States* v. *Yellow Cab Co.*, 340 U.S. 543); it does not suggest that indemnity claims arising from injuries to servicemen ever were contemplated by Congress.

[7] See, *e.g.*, 38 U.S.C. 301 *et seq.*, 401 *et seq.*, and 601 *et seq.*

uniform compensation for injuries or death of those in armed services" (340 U.S. at 144; footnote omitted). The Court found it unlikely that Congress would have intended to provide active duty servicemen an additional tort remedy, since apparently "there was no awareness [by Congress] that the Act might be interpreted to permit recovery for injuries incident to military service" (*ibid.*).

The Court also recognized that tort litigation would have an adverse effect on military discipline, an effect which Congress could not have intended. In *Brooks* v. *United States*, 337 U.S. 49, the Court had held that a serviceman on furlough could recover under the Tort Claims Act for injuries not incident to military service. The Court determined, however, that Congress had intended a different result in the case of a soldier "injured while performing duties under orders" (340 U.S. at 146).[8] The Court's reasoning was summarized in its subsequent decision in

[8] In *Brooks*, the Court had expressly reserved the issue of liability arising from injuries incident to service (337 U.S. at 52-53):

> Interpretation of the same words may vary, of course, with the consequences, for those consequences may provide insight for determination of congressional purpose. * * * The Government's fears may have point in reflecting congressional purpose to leave injuries incident to service where they were, despite literal language and other considerations to the contrary. The result may be so outlandish that even the factors we have mentioned would not permit recovery. But that is not the case before us.

United States v. *Brown*, 348 U.S. 110,[9] where the Court explained (348 U.S. at 112):

> The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed, led the Court [in *Feres*] to read [the Tort Claims] Act as excluding claims of that character.

Finally, the Court's holding with respect to legislative intent in *Feres* reflected the special relationship between the government and the members of its armed forces, a relationship that the Court aptly termed "distinctively federal in character" (340 U.S. at 143). Whereas under the Tort Claims Act liability depends upon state law, "the scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority" (340 U.S. at 143-144).[10]

[9] In *Brown*, the Court ruled that a discharged veteran could sue under the Tort Claims Act for an injury that occurred during hospitalization after discharge because the veteran was not "on active duty or subject to military discipline" and enjoyed a "civilian status" when the injury occurred (348 U.S. at 112). Justice Black, in dissent, argued that *Feres* should control because "the injury is inseparably related to military service" (348 U.S. at 114).

[10] The Court also noted that the Tort Claims Act imposes liability on the United States only "to the same extent as a private individual under like circumstances" (28 U.S.C. 2674) and that there is no "liability 'under like circumstances', for

The amalgam of all these factors was sufficient to convince the Court that Congress did not intend to establish a Tort Claims Act remedy for injuries to active duty servicemen incident to their military duties. The Court summarized (340 U.S. at 146):

> We conclude that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law. We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from established law in the absence of express congressional command.

b. *Similar considerations pertain here and preclude subjecting the United States to liability as indemnitor where it would not be liable to the serviceman*

As the court of appeals recognized, the *Feres* decision provides the analytical framework for resolving the issue of congressional intent as to third-party indemnity claims arising out of injuries to service-

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no private individual has power to conscript or mobilize a private army with such authorities over persons as the Government vests in echelons of command" (340 U.S. at 141-142). Subsequent decisions which arguably have eroded the requirement of parallel private liability have been careful to note that the military context has a unique claim to federal rather than state law. See *Indian Towing Co.* v. *United States*, 350 U.S. 61, 69.

men incident to service. As we have demonstrated (pp. 10-14, *supra*), a third party's action for indemnity requires proof that the acts or omissions of the military were the proximate cause of the serviceman's injury and therefore is essentially identical in substance to a suit brought by the serviceman directly against the United States. We now show that consideration of the consequences of allowing indemnity actions in the military context indicates a "congressional purpose to leave injuries incident to service where they were." *Brooks* v. *United States*, *supra*, 337 U.S. at 53.[11]

i. Indemnification would frustrate the limited-liability function of the veterans' compensation scheme

This Court consistently has looked to the presence of a statutory compensation scheme as an important indicator of congressional intent with respect to claimed remedies under the Federal Tort Claims Act. While the presence of a compensation statute "does not of necessity preclude a suit for negligence" (*United States* v. *Muniz*, 374 U.S. 150, 160), liability has not been permitted where the injury is covered by the compensation statute and "nothing in the legislative history of [the Federal Tort Claims Act] * * * pointed to any purpose to add tort claim

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[11] Petitioner characterizes the use of the practical guideposts identified in *Feres* as an "appropriateness test" (Br. 29). But, as this Court pointed out in *Brooks* v. *United States*, *supra*, 337 U.S. at 52, "consequences may provide insight for determination of congressional purpose."

recovery." *United States* v. *Demko*, 385 U.S. 149, 152.

Where servicemen have been injured in activities not incident to their military service, the servicemen's compensation scheme has been held not to preclude recovery under the Federal Tort Claims Act. *United States* v. *Brown*, *supra*, 348 U.S. at 113; *Brooks* v. *United States*, *supra*, 337 U.S. at 53. By contrast, the presence of a comprehensive scheme established to compensate for servicemen's injuries was one of a number of factors useful in identifying Congress' intent that the Federal Tort Claims Act not provide a cause of action for military servicemen for injuries incident to their military service. *Feres* v. *United States*, *supra*, 340 U.S. at 139.

As in *Feres*, the tort remedy claimed here is inconsistent with the military compensation scheme in its principal area of application, coverage for injuries arising out of activity incident to military service. One of the important functions of any statutory compensation scheme is that it limits, as well as determines, the extent of liability arising from an injury. Indemnity recovery would frustrate that function of the servicemen's compensation scheme by substantially enlarging the government's potential liability for an injury to a serviceman incident to service. While this practical consequence of an indemnity remedy may not be decisive, it is one useful indicator of Congress' probable intent in enacting the Tort Claims Act.

A basic premise in *Feres* was that tort actions arising out of injuries to servicemen must comport with the larger statutory scheme of remedies against the government. The complex system of statutes granting veterans compensation addresses a situation in which the United States employs enormous numbers of personnel in an occupation that by its nature is fraught with immense physical risk. The legislation that evolved over the years "provide[s] systems of simple, certain, and uniform compensation for injuries or death of those in armed services." *Feres* v. *United States*, *supra*, 340 U.S. at 141 (footnote omitted). The modern system of limited liability without fault is traceable to the Act of October 6, 1917, which established "a new and practical scheme of disability and death compensation analogous to workmen's compensation legislation." S. Rep. No. 1584, 80th Cong., 2d Sess., p. 5 (1948).[12] In *Feres*, this Court noted that "recoveries compare extremely favorably with those provided by most workmen's compensation statutes" (340 U.S. at 145).

The veterans compensation scheme represents a legislative balancing of the need to limit public expenditure against the desire to make adequate repara-

[12] "The conscience of the people of our time has enacted into law workmen's compensation. * * * That is the principle upon which this bill is founded." Hearings on H.R. 5723 before the House Committee on Interstate and Foreign Commerce, 65th Cong., 1st Sess., p. 42 (1917) (Statement of Samuel Gompers, President of the American Federation of Labor and Member of the Advisory Commission of the Council of National Defense).

tion for injuries arising out of dangerous public service. Like workmen's compensation, veterans compensation performs two functions. It provides benefits to the injured employee, in this context the serviceman and his dependents, while at the same time shielding the operations of the employer, in this context the government, from otherwise indeterminate liability. Like other compensation arrangements, that for veterans "not only * * * provide[s] for employees 'a remedy which is both expeditious and independent of proof of fault, but also for [the] employer a liability which is limited and determinate.'" *Busey* v. *Washington*, 225 F. Supp. 416, 423 (D. D.C.) (emphasis omitted).

This Court has noted the "protective mantle" afforded by compensation schemes. *Cooper Stevedoring Co., Inc.* v. *Kopke, Inc.*, 417 U.S. 106, 115. Recognizing the importance of this "protective mantle" to the integrity of statutory compensation plans, a number of courts have refused to permit third-party actions for indemnity that would "strip * * * an employer, of the protection of a compensation act." *Slattery* v. *Marra Bros., Inc.*, 186 F.2d 134, 139 (C.A. 2), certiorari denied, 341 U.S. 915. "If the rule were otherwise, the Government's immunity would be illusory, evaporating the instant that another wrongdoer could be found and brought in as a defendant." *Sheridan* v. *DiGiorgio*, 372 F. Supp. 1373, 1376 (E.D. N.Y.), affirmed, 505 F.2d 727 (C.A. 2), certiorari denied *sub nom. DiGiorgio* v. *United States*, 420 U.S. 990. See also *Galimi* v. *Jetco, Inc.*, 514 F.2d 949 (C.A. 2); *Busey* v. *Washington, supra.*

In the military context, this protective function of the veterans compensation scheme corresponds in importance to the enormous scope of potential liability. Yet, the protection that it offers to the government would be seriously weakened if third parties were permitted indemnification for damages incurred as a result of injuries to servicemen incident to service. For example, in this case the protective mantle would be breached equally by either a direct claim by Captain Donham or an indemnity claim by petitioner. In an age of almost completely mechanized military operations, an injured serviceman or his representative will often be able to locate a manufacturer in petitioner's position to act as the intermediate defendant and thus to subject the United States to an indirect liability for the same conduct for which it could not be held directly liable. As the court of appeals said, "it would be anomalous to insulate the United States from claims of a serviceman for recovery of tort damages for service-incurred injuries but authorize a third party in the position of [petitioner] to force the United States to indirectly pay those damages" (A. 44a). This Court said in *Laird* v. *Nelms*, 406 U.S. 797, 802:

> To permit respondent to proceed * * * here would be to judicially admit at the back door that which has been legislatively turned away at the front door. We do not believe the [Federal Tort Claims] Act permits such a result.

In the absence of explicit legislative guidance, Congress should not be deemed to have intended a result that would frustrate a major function of the

veterans compensation scheme. Only by precluding third-party as well as direct claims based on the injuries to active duty servicemen will the Tort Claims Act "be construed to fit * * * into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." *Feres* v. *United States, supra,* 340 U.S. at 139.

ii. Third-party indemnity claims would have the same adverse effects on military discipline as claims brought directly by the injured serviceman

Military service entails special requirements of discipline and order that contrast sharply with relationships among private citizens. See *Orloff* v. *Willoughby,* 345 U.S. 83; *Parker* v. *Levy,* 417 U.S. 733; *Greer* v. *Spock,* 424 U.S. 828; *Middendorf* v. *Henry,* 425 U.S. 25. Crucial characteristics of that setting are "[v]igor and efficiency on the part of the officer and confidence among the soldiers in one another." *In re Grimley,* 137 U.S. 147, 153. This Court accordingly recognized in *Feres* and later cases that Congress did not intend the courts to pass on the propriety of military decisions or to place members of the service in the position of having to testify in an adversarial setting as to each other's actions. "[I]t is the suit, not the recovery, that would be disruptive of discipline and the orderly conduct of military affairs." *Henninger* v. *United States,* 473 F.2d 814, 815-816 (C.A. 9), certiorari denied, 414 U.S. 819.

As we have shown (pp. 10-14, *supra*), the litigation of petitioner's indemnity suit would be nearly

identical in substance to the litigation that Captain Donham would pursue directly against the United States, were his claim not barred. There is no way to predict precisely where petitioner may attempt to lay the blame for Captain Donham's injury, but it is clear that the military officers who had ultimate responsibility for the design, procurement, maintenance, or use of the ejection system will be principal targets of the inquiry.

The fact that in this particular case the military personnel who will be deposed or required to execute affidavits or testify may not be the injured serviceman's immediate commanding officers (Pet. Br. 27) cannot be determinative of the propriety of allowing indemnity claims. At least two of the claims before the Court in *Feres* related to injuries inflicted by medical personnel rather than by officers commanding the injured claimants. But this Court properly refrained from establishing a rule that would make waiver of sovereign immunity turn on which military officers are alleged to have been negligent. Instead, the Court recognized that the congressional intent was generally to avoid tort suits that would require courts to review decisions made by military personnel in the course of their military responsibilities. Cf. *Henninger* v. *United States, supra.* The prospect of such review, and of potential governmental tort liabilities, might exert improper pressures on officers and result in hesitation where decisive judgment is called for.[13]

[13] Petitioner argues (Br. 27) that even if the government is not immune from third-party claims, the discretionary

The Court in *Feres* therefore correctly determined that Congress, in enacting the Tort Claims Act, did not mean to subject relationships within the military to state negligence law.

Petitioner argues (Br. 27) that even now there may be interference with military discipline when defendants to suits brought by servicemen assert that acts or omissions by commanding officers constituted an intervening cause of injury. It is certainly true that in some suits plaintiffs or defendants may seek to raise such matters and thereby involve military officers in the litigation.[14] But it is also true that the availability of an indemnity action would provide strong incentive to join the government as a defendant as a matter of course, thereby necessarily increasing the involvement of military personnel. The fact that the goal of freeing the military from the disruptive burdens of tort litigation may occasionally

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function exception to the Tort Claims Act (28 U.S.C. 2680 (a)) would preclude liability arising from military orders. The courts of appeals have placed a narrow interpretation on the scope of the discretionary function exception. See, *e.g.*, *Moyer* v. *Martin Marietta Corp.*, 481 F. 2d 585, 594-598 (C.A. 5). Cf. *Dalehite* v. *United States*, 346 U.S. 15. In addition, the courts have often required extensive litigation in order to determine whether the governmental action properly fits within their interpretation of the exception, litigation that would frustrate Congress' intent to free the military from the burdens and adverse effects of civil tort litigation arising out of their military responsibilities.

[14] Of course, since the United States would not be a party, discovery would be limited by the necessity to obtain personal jurisdiction over the officers and by the absence of any right to serve interrogatories to be answered by them. See Rules 33 and 45, Fed. R. Civ. P.

be frustrated even under the present scheme does not justify the wholesale frustration that inescapably would occur if, as petitioner urges, this Court sanctions the third-party action petitioner seeks to bring.

iii. A Tort Claims Act remedy by way of indemnity would place state law restraints on federal military actions

This Court in *Feres* concluded that a Tort Claims Act remedy that would cause liability to be dependent upon the vagaries of state law would be inconsistent with the exclusively federal character of the military. This consideration is equally applicable when the basis for liability is couched in terms of indemnification.

The military is called upon to play a unique and important national role in our society. It must maintain mobility and train troops in such places, times, and conditions as it sees fit for the effective performance of its defense mission. As the court of appeals stated, "[t]he Government is privileged to procure, maintain, and utilize its military hardware in a manner inappropriate for private parties" (A. 43a). While the laws of many states may prohibit indemnification on a tort theory where, as here, the third party defendant is not directly liable to the original plaintiff, other states may permit such indemnification. The result would be to subject the military to substantial potential liabilities, depending upon the peculiarities of state law and upon where its troops are trained and quartered.

Considerations such as these led this Court in *Feres* to conclude that direct tort liability to servicemen would be inconsistent with the military relationship which is "distinctively federal in character" and that the "scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority" (340 U.S. at 143-144, quoting from *United States* v. *Standard Oil Co.*, 332 U.S. 301, 305-306). Indemnity remedies, which would have virtually the same impact on the execution of federal military responsibilities, should not be read into the Federal Tort Claims Act either. The court of appeals correctly summarized (A. 53a):

> While we agree that the *Feres* opinion itself was not intended to decide the rights of third parties seeking indemnity, we think that the Court's emphasis on the unique nature of the military relationship is crucial to the instant cases. We cannot agree with [petitioner] that the general language of the [Federal Tort Claims Act] was intended to subject the conduct of the United States in equipping, training, and utilizing the Armed Forces to the varying standards of conduct and concomitant obligations and liabilities imposed by the states upon private citizens.

See also *United Air Lines, Inc.* v. *Wiener*, 335 F.2d 379 (C.A. 9), certiorari dismissed *sub nom. United Air Lines, Inc.* v. *United States*, 379 U.S. 951; *Adams* v. *General Dynamics Corp.*, 535 F.2d 489 (C.A. 9), petition for a writ of certiorari pending *sub nom.*

General Dynamics Corp. v. *United States*, No. 76-220. But see *Certain Underwriters at Lloyd's* v. *United States*, 511 F.2d 159 (C.A. 5) (where the court rejected an indemnity claim on the basis of state law).[15]

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[15] Petitioner contends that the decision below and other like decisions, such as *Wiener*, conflict with *Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597. But *Weyerhaeuser* did not involve the Federal Tort Claims Act. It arose under the Public Vessels Act, which provides a remedy against the United States "for damages caused by a public vessel of the United States" (46 U.S.C. 781). After a collision between a government vessel and a private vessel, the owner of the private vessel claimed damages pursuant to the divided damages rule in mutual fault collisions, "a rule of admiralty law which, for more than 100 years, has governed * * * the correlative rights and duties of two shipowners whose vessels have been involved in a collision in which both were at fault" (372 U.S. at 603). Unlike the instant case, where the question is whether Congress created a new right of recovery, the issue in *Weyerhaeuser* was whether a preexisting right of recovery had been abrogated by Congress. This Court's decision in *Weyerhaeuser*, that there was "no evidence whatever that Congress [in enacting the Federal Employees' Compensation Act] was concerned with the rights of unrelated third parties, much less of any purpose to disturb settled doctrines of admiralty law" (372 U.S. at 601), has no bearing on Congress' intent in enacting the Tort Claims Act.

Like *Weyerhaeuser*, *Wellington Transportation Company* v. *United States*, 481 F.2d 108 (C.A. 6), was brought pursuant to the Public Vessels Act and the court held simply that *Feres* would not bar the longstanding right to attorney's fees "that under federal maritime law * * * are consistently awarded" (481 F.2d at 111). Neither the Public Vessels Act nor a longstanding right to indemnity are involved where claimants seek third-party recovery under the Tort Claims Act for injuries to servicemen, and decisions that have relied upon these admiralty cases to resolve the question of congressional

iv. The allowance of noncontractual indemnity is not required by equitable considerations

Petitioner urges that the Court's interpretation of the Federal Tort Claims Act should be influenced by the absence of any alternative remedy for petitioner against the United States (Br. 14-15).[16] But whatever might be said of the equity in other situations, where the relationship between the third party seeking indemnity and the purported indemnitor arises in a commercial setting, there is no unfairness in limiting liability to that expressly assumed by contract.

Petitioner's relationship to the United States is that of manufacturer to contract buyer, and the rights and obligations of parties so related can fairly be confined to those established by the terms of their contract. In this case, for example, the price charged

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intent in passing the Tort Claims Act are in error. See, *e.g.*, *Barr* v. *Brezina Construction Co.*, 464 F.2d 1141 (C.A. 10), certiorari denied, 409 U.S. 1125.

[16] There is, of course, substantial doubt whether petitioner will be held liable to the original plaintiff, Donham. Even if Donham is able to prove his charge of faulty specifications, if, as petitioner alleges, petitioner relied exclusively upon specifications provided by the United States, petitioner should not be liable to Donham. See *Littlehale* v. *E. I. duPont de Nemours & Co.*, 268 F. Supp. 791, 804 (S.D. N.Y.), affirmed, 380 F.2d 274 (C.A. 2); *Dolphin Gardens, Inc.* v. *United States*, 243 F. Supp. 824, 827 (D. Conn.). See also *Myers* v. *United States*, 323 F.2d 580 (C.A. 9); *Merritt, Chapman & Scott Corp.* v. *Guy F. Atkinson Co.*, 295 F.2d 14, 16 (C.A. 9); *Person* v. *Cauldwell-Wingate Co.*, 187 F.2d 832 (C.A. 2), certiorari denied, 341 U.S. 936; *Davis* v. *Henderlong Lumber Company*, 221 F. Supp. 129 (N.D. Ind.).

by petitioner for development and manufacture of the egress system could have reflected all the risks and costs arising out of the contract. In particular, the price may well have covered the cost of liability insurance, or the cost of being a self-insurer, with respect to accidents of the very kind suffered by Captain Donham, the original plaintiff here.

Whether or not the contract price in fact was sufficient to compensate petitioner for all risks associated with the contract, the compelling fact is that petitioner voluntarily chose to do business without the protection of a contractual provision for indemnification and now seeks to reset the terms of the arrangement.[17] Preclusion of indemnity in these circumstances simply leaves standing the allocation of risks explicit or implicit in the contractual undertaking. There is nothing inequitable in this result.

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[17] The equity concerns here therefore are clearly different in kind from those raised by the plight of the injured private individual in *Rayonier, Inc.* v. *United States*, 352 U.S. 315, 320, where this Court feared that "when the entire burden falls on the injured party it may leave him destitute or grevi-ously harmed." Petitioner's reliance upon *United States* v. *Yellow Cab Co.*, 340 U.S. 543, also is misplaced. There, this Court found untenable a situation in which, if the government was sued directly, it could seek indemnity or contribution against a joint tortfeasor, but if the joint tortfeasor was sued directly, no third party action could be brought against the government. In contrast, in the military context presented here, the government cannot be sued directly, so that there is no possibility of the exercise of a one-way right to seek indemnity for damages for the original plaintiff's injury.

This case ultimately rests on congressional intent. If this Court's reading of congressional intent in *Feres* had been erroneous, Congress could have been expected to show its disapproval. As the Court itself noted, "if we misinterpret the Act, at least Congress possesses a ready remedy" (340 U.S. at 138). But more than a quarter of a century has passed, and Congress has done nothing to disturb the *Feres* result. Cf. *Laird* v. *Nelms*, *supra*, 406 U.S. at 802. The necessary inference is that this Court's reading was correct. And that reading governs this case as well.

In *Feres*, this Court stated that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service" (340 U.S. at 146) and "that Congress, in drafting this Act, [did not] create[] a new cause of action dependent on local law for service-connected injuries or death due to negligence" (*ibid.*). Petitioner here asserts a cause of action, and seeks to impose a liability, that this Court found not to exist under the Tort Claims Act.

The military must carry out an inherently dangerous mission utilizing manufactured vehicles and weapons of warfare. In such circumstances, the potential number of indemnity claims by manufacturers, who themselves may be found liable to injured servicemen, is enormous. The practical significance of the *Feres* doctrine would be seriously lessened if such indemnity claims were to be permitted.

The practical result would be the involvement of the military in a major way in the litigation of tort claims arising out of active duty military service. For officers with broad supervisory responsibility, the time spent in the litigation process could be onerous. The potential effects on military discipline, the exercise of judgment, and the training, movement, and utilization of troops, while necessarily speculative, could be significantly deleterious. While it is not possible to determine with precision the exact impact that petitioner's claimed remedy would have on the supervisory responsibility of the military over its personnel, it is clear that indemnity would involve a complex of important federal interests, and that it is peculiarly within the power of Congress to alter the "settled * * * practice" precluding tort litigation if it wishes. See *United States* v. *Standard Oil Co.*, *supra*, 332 U.S. at 316.

This Court faced a similar situation in *United States* v. *Gilman*, 347 U.S. 507, where the United States asked the Court to permit it to bring a cause of action for indemnity against an employee whose negligence had resulted in the liability of the United States to a third party under the Tort Claims Act. The Court found that the claimed indemnity remedy would undoubtedly have impacts upon employee relationships, morale and fiscal policy, but that the Court had "no way of knowing what the impact of the rule of indemnity we are asked to create might be" (347 U.S. at 510). The Court concluded that it was for Congress and not the courts to weigh the full impli-

cations of such a rule, and that until Congress spoke it would be inappropriate for the court to imply a new cause of action for indemnity (347 U.S. at 511-513; footnote omitted):

> Here a complex of relations between federal agencies and their staff is involved. Moreover, the claim now asserted, though the product of law Congress passed, is a matter on which Congress has not taken a position. It presents questions of policy on which Congress has not spoken. The selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. That function is more appropriately for those who write the laws, rather than for those who interpret them.

This reasoning is equally applicable to this case and indicates that the Court should not interpret the Tort Claims Act as permitting indemnity suits against the United States based upon injuries suffered by military personnel incident to military service.

B. If Sovereign Immunity Has Been Waived, Nevertheless Federal Indemnity Doctrines Govern Here, And They Preclude Recovery Where The United States Lacks Direct Liability To The Injured Person

Noncontractual indemnity is an equitable device for the just apportionment of liability between joint tortfeasors.[18] Indemnity, unlike contribution, places

[18] See Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. Pa. L. Rev. 130 (1932); Davis, *Indemnity Between Negligent Tortfeasors: A Proposed Rationale*, 37 Ia. L. Rev. 517 (1952).

the entire burden of damages upon one of two liable parties, on the theory that the negligence of the indemnitor has been active or primary, and the negligence of the indemnitee only passive or secondary.

Whether the normal indemnity rules should function where one of the joint tortfeasors is immune from suit by the plaintiff is a question that has given rise to controversy and division in state judicial decisions.[19] Where the bar to direct suit arises out of federal law, however, the implications of that bar for indemnity actions are to be determined by federal rather than state law. For example, where the Federal Employees' Compensation Act bars direct liability to the original plaintiff, but indemnity is claimed by a third party, the courts correctly have held that "the government's immunity from suit under FECA is federally created and the dimensions of that exemption must be measured by federal rather than state standards." *Sheridan* v. *DiGiorgio*, *supra*, 372 F. Supp. at 1375; *Newport Air Park, Inc.* v. *United States*, 419 F.2d 342, 346-347 (C.A. 1). See also *Travellers Insurance Co.* v. *United States*,

[19] A majority of the states bar indemnity suits against an employer who has paid workmen's compensation to the injured employee. "When a workman's compensation plan does cover particular employers and employees, a third-party suit against an employer who was also negligent is barred by the majority rule." *United States* v. *Seckinger*, 397 U.S. 203, 214 n. 19. Indemnity may sometimes be made available on a contractual or quasi-contractual theory in such circumstances, as in *Seckinger* itself. But petitioner's theory of recovery does not rest upon any contractual undertaking by the United States to hold petitioner harmless.

493 F.2d 881 (C.A. 3); *Galimi* v. *Jetco, Inc.*, 514 F.2d 949 (C.A. 2).

The same rule should apply to suits for indemnity arising out of injuries to servicemen incident to service. While local law is determinative in the typical case involving joint tortfeasors (*United States* v. *Yellow Cab Co.*, 340 U.S. 543, 551 n. 8), nothing in the language or legislative history of the Federal Tort Claims Act suggests that the indemnity implications of a federal bar to direct claims must be decided by reference to state rather than federal law. While many states, including Missouri, preclude noncontractual or tort indemnity where the injured party is covered by statutory compensation,[20] state law gen-

[20] Petitioner is incorrect in stating (Br. 19) that its indemnity claim would be allowed under Missouri law. Petitioner's claim would fail on at least three grounds.

First, Missouri law requires indemnity only where there is a breach of duty running from the indemnitor to the indemnitee independent of any duty to the injured party. No duty recognized by Missouri law runs from a purchaser (the United States) to a seller (petitioner). Indeed, Missouri courts have previously rejected indemnity claims by a manufacturer against a purchaser arising out of injuries to a third party from the use of the manufactured product. See *Lewis* v. *Amchem Products, Inc.*, 510 S.W.2d 46, 49 (Mo. Ct. App.).

Second, where the purported indemnitor is covered by the protective mantle of a workman's compensation scheme, Missouri only permits indemnity where there is a breach of duty running from the indemnitor to the indemnitee that the indemnitor *expressly* agreed to perform. *McDonnell Aircraft Corp.* v. *Hartman-Hanks-Walsh Painting Co.*, 323 S.W.2d 788, 796 (Mo. Sup. Ct.); *State ex rel. Laclede Gas Co.* v. *Godfrey*, 468 S.W.2d 693, 699 (Mo. Ct. App.). In the absence of such an express agreement, the purported indemnitor's liability to the injured party or to any third party ends with the payment of the statutory compensation. *Howard* v. *Wilson Concrete Co.*, 57 F.R.D. 8, 11 (W.D. Mo.).

Third, indemnity is allowed only when the indemnitee's fault is constructive or passive only. *State* v. *McLaughlin*, 315 S.W. 2d 499, 507 (Mo. Ct. App.). Where, as here, both the indemnitor and the indemnitee are jointly charged with negligence, indemnity does not lie. *Lewis* v. *Amchem Products, Inc., supra*, 510 S.W.2d at 49; *State* v. *McLaughlin, supra*, 315 S.W.2d at 506-507. See generally Comment, *Procedure—Third Party Practice—Non-Contractual Indemnification*, 28 Mo. L. Rev. 307 (1963).

erally does not supply a satisfactory guide for decisions that will impact on the federal concerns underlying the preclusion of direct claims by servicemen.

A majority of the lower federal courts that have considered the matter have precluded contribution or indemnity claims in the presence of statutory compensation acts where the direct claim of the injured party was barred by the sovereign immunity of the United States.[21] The sovereign immunity bar removes the possibility of joint liability to the injured party, one of the fundamental prerequisites of federal common law indemnity. The leading case is *United Air Lines, Inc.* v. *Wiener*, 335 F. 2d 379 (C.A. 9), certiorari dismissed *sub nom. United Air Lines, Inc.* v. *United States*, 379 U.S. 951, where the court of appeals precluded indemnity or contribution in a case arising out of injuries to federal non-military em-

[21] By its remand in *Treadwell Construction Co.* v. *United States*, 372 U.S. 772, this Court left open the question whether federal common law would preclude indemnity in a situation where the purported indemnitor was not liable to the injured party.

ployees whose direct claims were barred by the Federal Employees' Compensation Act scheme. The court of appeals stated (335 F. 2d at 403):

> [N]either contribution nor indemnity may be awarded without the support of liability on the part of the indemnitor to the person injured. The courts have consistently held that in the absence of an express or implied contract of indemnity, or in the absence of the indemnitor's liability to the injured party, there can be no recovery for indemnity.[22]

Similarly, in *Galimi* v. *Jetco*, *supra*, the Second Circuit held that where a statutory compensation scheme bars direct liability by the injured party, "a third-party claim for contribution or tort indemnity against the United States does not lie" (514 F. 2d at 953). See also *Kudelka* v. *American Hoist & Derrick Co.*, 541 F. 2d 651 (C.A. 7); *Travellers Insurance Co.* v. *United States*, 493 F. 2d 881 (C.A. 3); *Newport Air Park, Inc.* v. *United States*, *supra*; *Sheridan* v. *DiGiorgio*, *supra*; *Murray* v. *United States*, 405 F. 2d 1361 (C.A. D.C.). But see *Wallenius Bremen G.m.b.H.* v. *United States*, 409 F. 2d 994 (C.A. 4), certiorari denied, 398 U.S. 958.[23]

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[22] Petitioner has never claimed that his alleged indemnity rights are based upon either an explicit or implied contractual undertaking. Cf. *Ryan Co.* v. *Pan-Atlantic Corp.*, 350 U.S. 124, 133-134. Any claim of indemnity based upon the contract between petitioner and the United States could properly be brought only in the Court of Claims. See note 4, *supra*.

[23] Cf. *Slattery* v. *Marra Bros., Inc.*, 186 F.2d 134, 139 (C.A. 2), certiorari denied, 341 U.S. 915 (Judge L. Hand) ("We cannot, however, agree that that result [indemnity] is rationally possible except upon the assumption that both parties are liable to the same person for the joint wrong."

Compelling policy considerations underlie adherence to the requirement of joint liability as a condition to tort indemnity under federal law. Where the liability of the purported indemnitor to the injured party is barred by statute, a decision by the courts to permit indemnity and impose liability for the underlying injury by indirection would represent a judicial overruling of a legislative judgment. In this case, for example, Congress has declined to waive sovereign immunity to suits by the original plaintiff, and the allowance of indemnity would undercut that legislative determination. Moreover, judicial imposition of indemnity would be especially inappropriate where, as here, allowing indemnity would frustrate a statutory compensation scheme and threaten interference with the conduct of military activities (see pp. 18-29, *supra*).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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